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No. 77-1191

# In the Supreme Court of the United States

OCTOBER TERM, 1977

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HOWARD GISH and JACQUELYN GISH, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 559 F. 2d 572. The opinion of the district court (Pet. App. 7a-9a) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on August 23, 1977. A timely petition for rehearing was denied on November 22, 1977. The petition for a writ of certiorari was filed on February 21, 1978 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether the Small Business Administration (SBA) may obtain a deficiency judgment for the unpaid balance of a

disaster loan, where the applicable SBA regulations and the express terms of the loan agreement authorize the SBA to recover the deficiency, even though a state statute prohibits actions for deficiency judgments after summary foreclosure sales of real property.

## STATEMENT

In 1967 petitioners obtained a $147,000 disaster loan (later increased to $160,000) from the Small Business Administration. The loan was secured by deeds of trust on three parcels of real property. Each of the deeds of trust contained two typed-in clauses governing petitioners' liability in case of default (Pet. App. 1a). The first provided that the trustor "shall be liable for and agrees to pay any deficiency" (*ibid.*); the second provided (*id.* at 2a):

> The undersigned further agrees that, pursuant to Part 101 of the Rules and Regulations of the Small Business Administration, this instrument is to be construed and enforced in accordance with the applicable Federal law. The undersigned hereby waives any local immunity from the performance of any obligation hereunder.

After granting petitioners several deferments and a six-month extension on the loan payments, the SBA declared the loan in default and sold the three properties held as collateral for the loan. The SBA then filed suit against petitioners in the United States District Court for the District of Alaska to recover $121,000, which was the balance of the loan remaining after the proceeds of the sale were applied to the outstanding indebtedness (Pet. App. 2a).[1]

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[1] Petitioners made less than $4,000 in payments on the loan (Pet. App. 2a).



Petitioners moved to dismiss the action on the ground that it was barred by an Alaska statute prohibiting recovery of a deficiency judgment after a summary foreclosure and sale of real property. The district court granted summary judgment to petitioners and dismissed the complaint, holding that the SBA's suit was barred by the Alaska statute and that the protection of that statute had not been waived by the terms of the deeds of trust (Pet. App. 7a-9a).

The court of appeals reversed. It held that by the terms of the deeds of trust petitioners were obligated to pay the deficiency. They had expressly waived the protection of the Alaska deficiency judgment statute, the court held, both by waiving "any local immunity from the performance of any obligation" under the loan agreement and by agreeing that the deeds of trust would be enforced according to federal law, rather than the law of Alaska (Pet. App. 5a). The court further noted that the applicable SBA regulations, 13 C.F.R. 101.1(d)(2) and 13 C.F.R. 101.1(d)(4), provided that deeds of trust held by the SBA would be construed and enforced in accordance with federal law and that parties receiving SBA assistance could not assert local immunities to defeat their obligations to the agency (Pet. App. 3a-4a). Accordingly, the court held that the district court erred in dismissing the SBA's complaint.

## ARGUMENT

1. Both the SBA regulations, 13 C.F.R. 101.1(d)(2), and the language of the deeds of trust establish that federal law governs the enforcement of the terms of the loan. Petitioners concede that federal law is applicable here (Pet. 11), but they urge that the Alaska statutory restriction on deficiency judgments should be applied as federal law in this case. As to the enforceability of deficiency judgments, however, the regulations not only

ensure that federal law will apply but also provide the substantive federal rule: that SBA debtors "shall not be entitled to claim or assert any local immunity to defeat" their obligation to the United States. 13 C.F.R. 101.1(d)(4).

While recognizing that the SBA regulations are controlling in the enforcement of SBA loan agreements, petitioners argue that the regulations do not apply to the Alaska deficiency judgment statute. They contend (Pet. 11) that the Alaska statute barring deficiency judgments in certain circumstances "is not an immunity in the traditional, technical usage of that term" and that it does not "defeat" the obligation of the debtor, but merely limits the creditor's recovery. But the purpose of the regulations is to prevent SBA debtors from using state debtor protection devices to defeat—in part or in whole—obligations owed to the SBA. The regulations were properly applied here to ensure that peculiar state debtor protection provisions would not interfere with the uniform administration of federal lending programs. *United States* v. *Lowell*, 557 F. 2d 70, 74 (C.A. 6); accord, *United States* v. *Riley*, 340 F. Supp. 1164, 1168 (W.D. La.).[2]

2. Petitioners contend (Pet. 12-17) that the court of appeals' decision is inconsistent with *United States* v. *Yazell*, 382 U.S. 341, and with decisions of other courts.

*Yazell* held the Texas law of coverture applicable to bar the SBA's recovery against a married woman's separate property. The Court noted, however, that the loan in that

[2]Because the regulations and the terms of the deeds of trust establish that the SBA is entitled to a deficiency judgment in this case, it is not necessary to rely additionally on the Administrator's statutory authority to seek deficiency judgments. See 15 U.S.C. 634(b)(4).



case was negotiated with specific reference to Texas law, and that the SBA was aware throughout that the contract would be subject to Texas law, with its full complement of debtor protection devices. Under those circumstances, the court concluded that the SBA was seeking the application of federal law in order to gain "the unconscionable advantage of recourse to assets for which it did not bargain" (382 U.S. at 346). The Court observed that the contract had been made "in the absence of federal statute, regulation or even any contract provision indicating that the state law would be disregarded" (382 U.S. at 350-351).

The SBA promulgated the regulations at issue here to protect against claims under unusual State debtor immunity provisions. The provisions in the deeds of trust here called petitioners' attention to the regulations, and petitioners explicitly agreed that they would be liable for any deficiency and would waive the benefits of state law provisions excusing them from liability. Accordingly, because the regulations and the deeds of trust made it clear that federal law would be applied and that a deficiency judgment could be sought after summary foreclosure, the deficiency is recoverable under the analysis of *Yazell*.

In asserting a conflict among the circuits, petitioners rely chiefly on *Weinstein* v. *United States*, 511 F. 2d 56 (C.A. 6), which held that an Ohio law requiring notice to a mortgagor of any sale of collateral before he would be subject to a deficiency judgment applied to an SBA loan, even in the face of a written waiver of the right to notice. As in *Yazell*, but not the present case, the note and subsequent agreements between the SBA and the debtor in *Weinstein* were executed in accordance with state law and without reference to federal law or to the SBA regulations. Moreover, the Sixth Circuit subsequently

held that the SBA regulations manifest a federal interest "sufficient to override state law." *United States* v. *Beardslee*, 562 F. 2d 1016, 1021-1022 and n. 2 (C.A. 6); *United States* v. *Lowell*, *supra*. The Court in *Beardslee* distinguished *Weinstein*, noting that at the time *Weinstein* was decided the SBA regulations were only two months old and were apparently not called to the court's attention. 562 F. 2d at 1022 n. 3. Accordingly, there is no present conflict between the Sixth and Ninth Circuits.[3]

3. Petitioners further assert (Pet. 18-20) that the court of appeals incorrectly decided an issue of state law. As the opinion makes clear, however, the court of appeals applied federal law, not state law, in deciding this case. The decision did not purport to construe Alaska's law of creditor-debtor relationships, and it has no effect whatever on that law. Even if the court had construed state law, moreover, there would be no reason for review here. *Bishop* v. *Wood*, 426 U.S. 341, 345-346.

Finally, petitioners contend (Pet. 20-22) that the decision will confuse the law of debtor-creditor relations. The argument is based entirely on the fact that, where federal law applies, a result different from that under state

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[3]The other cases cited by petitioners (Pet. 18) either did not involve the issue of the availability of a deficiency judgment (*Frederick* v. *United States*, 386 F. 2d 481, 486-487 (C.A. 5)), or involved contract provisions that did not purport to displace state law (*United States* v. *Terrey*, 554 F. 2d 685, 692 (C.A. 5); *Lilygren* v. *United States*, 370 F. 2d 366 (C.A. 10)).

Petitioners cite *State ex rel. Lonctot* v. *Sparkman & McLean Co.*, 16 Wash. App. 402, 556 P. 2d 946, review denied, 89 Wash. 2d 1002, as being in direct conflict with the decision in this case. We submit that a conflict between the Ninth Circuit and the decision of an intermediate appellate court in the State of Washington, concerning the application of a special provision of Alaska law, does not require this Court's attention.



law may obtain. Yet it has long since been accepted that differences in outcome are inevitable once it is acknowledged that federal law has any part to play in relations between federal creditors and individual debtors. See *Clearfield Trust Co.* v. *United States*, 318 U.S. 363. Here, where the parties were fully apprised that federal law would apply, and where they agreed to the application of federal law and the exclusion of particular state law provisions, the case for applying federal law and giving the SBA the benefit of its bargain is compelling.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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